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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

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No.

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GENERAL FOODS CORPORATION, *Petitioner,*

v.

WILLIAM E. GREENE, d/b/a
WILLIAM E. GREENE FOOD DISTRIBUTORS, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, General Foods Corporation, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 11, 1975.

### OPINION BELOW

The opinion of the Court of Appeals (Appendix 1a), review of which is sought, is reported at 517 F.2d 635. The Order and Final Judgment of the District Court, as amended (Appendix 58a), entered in this action on January 2, 1974, was issued without written opinion.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1975, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Where a coffee producer contracts to sell its product to large hotel and restaurant customers at agreed prices and credit terms, and where the producer assumes all the economic risks of the sale, does the arrangement become illegal resale price-fixing in *per se* violation of the Sherman Act because orders from such customers are thereafter taken by a distributor and filled from the distributor's own inventory for a fixed delivery fee which is unrelated to the price at which the goods are sold?

2. Where a plaintiff in private antitrust litigation helped to develop and voluntarily participated in allegedly illegal marketing practices for 17 years and during that time collected service fees for the role he performed, is the defendant entitled to have the jury consider this conduct and other facts and determine whether plaintiff's claims are subject to an *in pari delicto* or related equitable defense under the limited exception to the rule of *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968)?

## STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act, 15 U.S.C., Section 1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade

or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

## STATEMENT OF THE CASE

Petitioner General Foods Corporation ("General Foods"), with annual gross sales in excess of $2 billion, is the largest processor and marketer of coffee in the United States. Respondent William E. Greene ("Greene"), a sole proprietor doing business as William E. Greene Food Distributors, was a wholesale distributor of General Foods products.

In order to compete effectively with other coffee producers in sales to multiple outlet hotel and restaurant customers, General Foods adopted the common marketing practice of dealing directly with such accounts, many of which operated on a national basis. These direct selling arrangements established the price and terms of all sales between the institutional buyer, known as a Multiple Food Service Account ("MFSA") and General Foods. To effect delivery of its products pursuant to this agreement, General Foods contracted with local distributors such as Greene to solicit and fill the orders of the MFSA accounts as agents for General Foods. The local distributors also sold General Foods products to their own customers as independent wholesalers.

Greene first became a distributor for General Foods in 1947 in Charleston, South Carolina, and in 1954 moved to Tallahassee, Florida, where he remained until his distributorship was terminated on January 5, 1971.[1] Under the terms of his distributorship agree-

[1] A distributor agreement entered into in 1954 was superseded by an agreement dated August 13, 1958, which is at issue here.

ment, Greene agreed both to sell Maxwell House coffee and other General Foods products to his own customers and to deliver these products as agent for General Foods to MFSA accounts within a designated territory. Such sales and deliveries were to be made from Greene's own stock of General Foods products.

The MFSA sale would be executed on a General Foods invoice which directed the MFSA buyer to make its payment for the goods it received directly to General Foods. The invoice carried the printed guarantee of General Foods that the products described in the invoice complied with all federal pure food laws and were properly branded. Greene's relationship as agent for General Foods to this sales transaction was noted on the invoice by the words "delivered by William E. Greene Food Distributors." The distributorship agreement did not prohibit Greene from distributing products of other manufacturers. It did require Greene to maintain an inventory of those food products manufactured by General Foods for which there was an established market in the area. Greene was required to warehouse and rotate these stocks, maintain and repair the coffee making equipment installed by General Foods on the premises of MFSA customers, and generally handle the servicing of the MFSA accounts as an agent of General Foods.

Greene's sole compensation for servicing the MFSA accounts was a fixed delivery allowance that was unrelated to the price charged to these accounts by General Foods, unaffected by changes in market conditions, and varied only with the size of the order. Upon giving notice of delivery to an MFSA account, Greene would receive cash or a credit from General Foods equal to his cost for the goods delivered. General Foods

extended sales credit to the MFSA buyer, was responsible for the collection of monies due, and assumed the risk of default. In the case of default General Foods had no recourse to Greene for the sales price. The MFSA account had no contractual relationship with Greene and had to look to General Foods for satisfaction in the event merchandise of poor quality was delivered or if there was a failure to comply with the terms of the contract between General Foods and the MFSA buyer.

As noted above, Greene also acted as an independent wholesaler of General Foods products and in this capacity made sales to his own customers known as down the street ("DTS") accounts. Greene purchased products from General Foods for this purpose at mutually agreed prices and resold the goods to the DTS customers at prices he established. Such sales were written on his own invoice form and payments were made directly to him. General Foods did not participate in any way in these sales transactions, had no privity of contract with the DTS customer, and in no way controlled the prices charged by Greene.

Greene's distributorship arrangement with General Foods was terminated by written notice on January 5, 1971, for violations of the express provisions of the agreement. On September 27, 1971, Greene brought this action under the Sherman Antitrust Act, 15 U.S.C., Section 1, and alleged that General Foods sales to MFSA accounts constituted unlawful resale price maintenance inasmuch as Greene had held legal title to the goods which he delivered to such accounts.

Following trial General Foods requested that the jury be given two critical instructions:

(i) that General Foods could not be found guilty of illegal price-fixing if the jury made a factual finding that the sales to MFSA accounts were made by General Foods directly and that Greene's role was that of a delivery agent of General Foods, and

(ii) that Greene would not be entitled to recover damages if he had helped develop and freely and voluntarily participated in the marketing practice that he now alleged violated the antitrust laws.

The District Court refused to grant either instruction and the jury returned a verdict in favor of the plaintiff from which an appeal was taken.

The Fifth Circuit Court of Appeals affirmed the judgment of the District Court and held that General Foods' MFSA distribution system constituted a *per se* price-fixing violation of the Sherman Act. Focusing on the fact that title to the goods delivered to the MFSA customers had rested with Greene, the Court of Appeals concluded that General Foods could not lawfully establish the price at which these goods were sold.

The Fifth Circuit affirmed the District Court's refusal to instruct the jury regarding Greene's long and willing participation in the MFSA sales program, stating that it "seriously questioned" whether *in pari delicto* or related equitable defenses could bar plaintiff's recovery in view of this Court's decision in *Perma Life Mufflers, Inc.* v. *International Parts, Corp., supra.*

## REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals poses novel and important questions of federal antitrust law and marks a significant extension of the law of resale price maintenance. The case has an impor-

tance that is far greater than the financial self-interests of the particular litigants since a substantial segment of American industry utilizes methods for distributing goods similar or identical to the method that the Fifth Circuit here has condemned. If the broad edict of the court below remains undisturbed, it will force firms to restructure their marketing activities and encourage vertical integration with far-reaching consequences for the economy.

The opinion of the Fifth Circuit is in sharp conflict with decisions of the Third and Tenth Circuits which have approved marketing plans that are substantially the same as the plan that the Court of Appeals here found illegal. In holding the General Foods' distribution system to be in *per se* violation of the antitrust laws, the Fifth Circuit misinterpreted and misapplied the decision of this Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). The disarray into which the decision below casts the law on resale price maintenance calls for an exercise of this Court's power of supervision.

Further, this case establishes the pressing need for Supreme Court guidance regarding the use of *in pari delicto* as a defense in private antitrust litigation. The Fifth Circuit approved the District Court's refusal to allow the jury to determine whether the respondent freely and voluntarily participated in the allegedly unlawful marketing scheme. In thus deciding that General Foods was not entitled to have the jury consider whether Greene's conduct barred any recovery, the Fifth Circuit adopted a legal position in conflict with the legal position of other circuits. This conflict is perhaps understandable in view of the unresolved nature of this area of antitrust law following this Court's

holding in *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra,* where the majority decision of this Court was composed of five separate and widely divergent opinions. A writ of certiorari should be granted to settle the important issues of federal antitrust law which this case raises.

**1. The Fifth Circuit's Decision That General Foods' Marketing Program Constituted a per se Violation of the Sherman Act Is in Direct Conflict with Decisions of Other Courts of Appeals.**

The finding of resale price maintenance under the facts of this case presents a classic example of conflicting decisions between the circuits that requires resolution by this Court. The decision of the Fifth Circuit conflicts in reasoning and principle with decisions of the Court of Appeals for the Tenth Circuit in *American Oil Co.* v. *McMullin,* 508 F.2d 1345 (10th Cir. 1975) and the Court of Appeals for the Third Circuit in *Goldinger* v. *Boron Oil Co.,* 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd without opinion,* (3d Cir. Mar. 7, 1975), *cert. denied,* 44 U.S.L.W. 3202 (Oct. 6, 1975).

Following a comprehensive review of the decisional law regarding price-fixing and relying primarily on *Simpson* v. *Union Oil Co., supra,* as authority, the Fifth Circuit rejected Petitioner's argument that Greene was legally a delivery agent for General Foods in making sales to MFSA accounts. The Court emphasized that Greene held legal title to the goods which were delivered to MFSA accounts, stored them in his warehouses at his own expense, and bore the risk of their physical destruction. The Court also stressed the activities performed by Greene:

> The actual "selling"—the solicitation of orders, the moving of merchandise, most of the risk of

> loss, and the day-to-day task of creating and maintaining customer satisfaction—is performed by Greene and his counterparts, and not by some central selling staff of General Foods. (517 F.2d at 657-658.)

The crucial question, however, is the capacity in which Greene performed these activities. *See Stan Togut Corp.* v. *Hobart Mfg. Co.*, 398 F. Supp. 1323 (S.D. N.Y. 1974). Insofar as MFSA accounts are concerned, it is clear that he acted as agent for General Foods. By hypothesis there can be no "resale price maintenance" unless there has been a resale by an independent distributor. Put another way, there is nothing illegal about a manufacturer setting the price at which it will sell its goods to its own customers. Nor is there anything in the antitrust law that prevents a manufacturer from contracting with a distributor to serve two functions, the first as an independent wholesaler purchasing for his own account for resale to his own customers and the second as a delivery and servicing agent filling orders on sales made directly by the manufacturer to its own large national accounts. The Fifth Circuit here disregarded the substantive difference between the two kinds of transactions.

In *American Oil Co.* v. *McMullin, supra,* the Tenth Circuit considered the legality of a method of distribution used in the oil industry which is strikingly similar to that employed by General Foods. In the *McMullin* case a dealer had entered into a contractual arrangement with American whereby he agreed to act as the employee-agent of the Company for bulk sales of petroleum products to customers of American Oil Company at prices established by American. The dealer was compensated by a commission for these sales, the amount of which was unrelated to the price charged for the product, but varied according to the distance from the

plant to the customer. On these sales, American assumed the credit risk.

The dealer operated as an independent businessman a truck stop and branded American service station at the same location and set his own prices for these sales. The dealer could also make sales to his own customers from the bulk plant at prices he established and he assumed the credit risk for these accounts. The fuel pumps for the truck stop and service station were connected directly to the bulk storage tanks and the dealer's inventory of products for sales to his own customers was thus intermingled with that sold to American customers at the bulk plant. American retained title to all petroleum products until they were sold.

American terminated the dealer and filed suit to recover various contractual obligations he owed. The dealer counterclaimed in that action and charged American with violations of the Sherman Act. The dealer contended that "he should be characterized as some type of independent dealer . . . rather than as an employee-agent" and argued that the marketing arrangement for the sale of petroleum products to American customers from the bulk plant constituted an illegal price-fixing agreement:

> [B]y nominally separating the Elko operation into two distinct components and contracting with McMullin as an employee-agent on the one hand and as a lessee dealer on the other, American sought to accomplish an illegal objective by a purely formal arrangement. * * *
>
> McMullin strongly urges that his bulk plant arrangement with American is analogous to the consignment arrangement condemned in *Simpson* v. *Union Oil Co.* (508 F.2d at 1351.)

The Tenth Circuit rejected this argument and held that the *Simpson* case did not prohibit a manufacturer from distributing its own products by means of agents and thereby controlling wholesale distribution prices. The fact that McMullin assumed "operational expenses and certain business risks associated with the bulk plant" was not controlling and the Court further indicated that the issue of legal title to the goods was not determinative. The Court noted that sales from the bulk plant were made in American's name and concluded:

> We find ample justification for segregating the bulk plant operation from the truck stop. Despite their presence at the same site, they were naturally two distinct operations, and each was well established in the industry. * * * We find nothing which would persuade us to characterize the relationship of the parties other than as they characterize it themselves. (508 F.2d at 1351.)

Similarly, the Third Circuit rejected a claim of resale price maintenance in *Goldinger* v. *Boron Oil Co., supra.* This case did not involve a distributor who performed the dual role of an independent dealer and servicing agent of a manufacturer. Instead the Court had to determine the single legal capacity in which the distributor sold petroleum products. The case arose when the defendant oil company terminated a contract with the plaintiff that allowed him to operate a service station on behalf of the Company. The plaintiff charged that his contractual agreement permitted the Company to set the prices charged in the station and that this arrangement was an illegal price-fixing scheme under *Simpson* v. *Union Oil Co., supra.* Plaintiff argued that despite any technical legal arrangement with the company, he was to be considered an independent business-

man for purposes of the antitrust laws since the challenged system of distribution imposed upon him "large risks and substantial managerial responsibilities. . . ." 375 F. Supp. at 407. Plaintiff noted that he "had a sizable personal investment in the business, hired and fired his own employees, paid for his own insurance, did all his own bookkeeping, ran his own service and repair business on the premises, and had the full risk of loss for any thefts or shortages of gasoline or other products procured from defendant." It will thus be noted that factors which the Fifth Circuit relied upon so strongly for upholding Greene's position are similar to the contentions advanced by Goldinger in the Third Circuit. Yet the Third Circuit affirmed the holding that the marketing program was legal and that plaintiff's reliance on the *Simpson* case was misplaced:

> There is no dispute that defendant established the prices at which these products were to be sold. It is also established that the plaintiff's compensation for the sale of gasoline was not related to the retail price at which said gasoline was sold because the plaintiff was compensated on a fixed rate per gallon of gasoline dispensed.
>
> * * *
>
> With respect to the sale of gasoline the plaintiff was not obliged to receive and distribute any particular amount in any given period of time. His inventory of gasoline and allied products would be restocked by the defendant upon the call of the plaintiff.
>
> The plaintiff's only risk from price competition was that he might suffer a diminution in the quantity of gasoline sold from his station and hence a lessening of his fixed gallon commission, but the ordinary risk of the market was not placed upon him. * * * If . . . defendant company retains in its

> own hands the absolute price at which gasoline and related products are to be sold by those employed by it and the defendant continues to bear the major risks of the market place from that policy, we cannot find that the within contract is an agreement in restraint of trade by two independent parties engaged in that trade. (375 F. Supp. at 408-409.)

In formulating legal guidelines for determining whether a distributor lawfully sells goods at prices established by the manufacturer, the Third and Tenth Circuits have concentrated on the substance of the transaction with emphasis on the purpose underlying the arrangement. *See also Pogue* v. *International Industries, Inc.*, 5 Trade Reg. Rep. (1975-2 Trade Cas.) ¶ 60,532 (6th Cir. Oct. 14, 1975). In contrast, the Fifth Circuit places unwarranted emphasis on such matters as who holds formal legal title to the goods and who bears the risk of physical destruction of the goods. Such technical considerations have simply been deemed not determinative in the other Circuits.

The decision in *American Oil Co.* v. *McMullin* is based upon the Tenth Circuit's recognition that the complaining distributor in fact played a dual role. The legal concept adopted by the Tenth Circuit is not novel. The law in other circumstances recognizes that a person can operate concurrently in more than one legal capacity. Under our tax laws, for example, a securities broker receives ordinary income tax treatment when he acts as an agent for his customers in trading stock, but is entitled to capital gains treatment when he sells stock as a personal investment. 26 U.S.C., Section 1236.

The Fifth Circuit's undue reliance on the fact that Greene held title to the goods and assumed certain

operational expenses and non-market risks appears to have been based on a fundamental misinterpretation of *Simpson* v. *Union Oil Co., supra.* This Court has realistically concluded that the antitrust laws are aimed not at form but at substance. *United States* v. *Yellow Cab Co.,* 332 U.S. 218 (1947). It is for this reason that the Court has concluded that antitrust legality should not be made to turn on the question of title. *Simpson* v. *Union Oil Co.* involved an arrangement whereby the oil company consigned its gasoline to dealers for sale to consumers at the oil company prices. A majority of this Court held the arrangement to be an unlawful resale price maintenance scheme. This Court did not challenge the validity of the consignment insofar as title was reserved by the oil company but said that to let this be controlling "would be to make legality for antitrust purposes turn on clever draftsmanship." 377 U.S. at 24.

The situation presented in this case is the obverse of that found in the *Simpson* case and should be considered with the same attention to substance over form. MFSA orders were filled from inventory to which Greene had legal title but the *substance* of these sales transactions negates the existence of any illegal price-fixing or restraint of trade. Thus, General Foods negotiated directly with MFSA accounts regarding the terms of sale including price, while in the *Simpson* case Union Oil had no contract with the retail gasoline customers who were thus denied the opportunity to negotiate on prices and terms with either Union Oil or its dealers. Whereas General Foods received payment directly from the MFSA account and extended the credit on these sales, payments in the *Simpson* case were made by the customer not to Union Oil but di-

rectly to the retail dealer. Greene's compensation was a fixed delivery allowance that was unrelated to the price charged for the goods, while Simpson's profit depended upon "the rise and fall in the market price. . . ." 377 U.S. at 20. The purpose of the General Foods-Greene selling arrangement was to provide an efficient means of effecting delivery of goods to customers with whom General Foods had negotiated terms of sale. In *Simpson* the only purpose of the consignment system was to fix prices. Allowing the issue of resale price maintenance to turn on passage of legal title is exactly what this Court indicated was inappropriate in *Simpson*.[2]

In determining the validity of a marketing program under the antitrust laws, this Court has consistently looked to the nature of the arrangement and to its actual impact upon competition. Resale price maintenance has been deemed illegal because the buyer's access to a free market price is foreclosed. No such denial of access exists here. Illegal price-fixing does not occur where an MFSA account agrees with General Foods on the prices it will pay for General Foods products. The

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[2] The fact that title is not determinative of an agency relationship is well illustrated by *Culbertson* v. *JNO. McCall Coal Co.*, 275 F. Supp. 662 (S.D. W.Va. 1967), *aff'd*, 495 F.2d 1403 (4th Cir.), *cert. denied*, 419 U.S. 1033 (1974). In that case plaintiff sued defendants for an accounting due under an agency relationship. Defendant argued that he was not an agent and emphasized that under the agreement between the parties he had taken title to the goods and resold them. The court stated that this fact was insufficient to overcome the legal conclusion that defendant was operating as plaintiff's agent:

> It seems to be well established that a principal can transfer legal title to an agent so that the agent can deal more freely with the subject matter of the agency. * * * See Restatement Agency 2d, Section 14J, Comment b(1)(2). (275 F. Supp. at 679.)

MFSA purchaser is the customer of General Foods, not of the distributor, and this relationship does not change or cease to exist because the distributor undertakes the responsibility of product delivery and equipment servicing for a guaranteed fixed fee from General Foods.

The *Simpson, McMullin* and *Goldinger* cases all make clear that the critical test of whether a distributor is acting for himself or his supplier is whether that distributor is directly subject to price competition and the economic risks of the marketplace. This is a test of substance. The Fifth Circuit improperly applied a test of form—one based on Greene's legal title and customer contacts. We submit that the Fifth Circuit's opinion is based on a misreading of this Court's decision in *Simpson* v. *Union Oil Co.*, where the sole purpose of the marketing scheme was to fix the retail price of dealers who otherwise assumed all economic risks of the sales transaction. Here, as the following summary demonstrates, General Foods bore all economic risks of the sale to an MFSA account and the lawful purpose underlying this marketing arrangement is clear:

1. General Foods had the initial contact with the MFSA buyer and negotiated the price, credit arrangements, and other terms of sale applicable to all orders subsequently placed by the MFSA account.

2. Sales to the MFSA accounts were made in the name of General Foods on the Company's invoice which bore a General Foods quality guarantee. Sales by Greene to his own customers on the other hand were written on Greene's own invoice.

3. General Foods extended the credit on all sales to MFSA accounts and assumed the risk of collection

of accounts receivable. Customer payments were made directly to General Foods.

4. Greene received a fixed delivery allowance as compensation for soliciting orders from MFSA accounts and making deliveries to them. This fee was unrelated to the price (or profit or loss) at which products were sold. Greene assumed no risk of inventory losses due to market fluctuations.

General Foods did not insist that Greene follow the meaningless formality of segregating merchandise for resale to Greene's own customers from the stock destined for delivery to General Foods customers. Instead, Greene's account was credited for the full cost of all goods he delivered to the MFSA account. Prior and meaningless segregation of inventories would in no way have changed the substance of the transaction.

The Fifth Circuit has greatly distorted the holding of the Court in *Simpson* and thus condemned marketing practices which have gained widespread use in industry and which in no way restrain trade. This unwarranted and radical expansion of the law on resale price maintenance by the Fifth Circuit in this case is highlighted by the conflict among the Circuits and deserves the attention of this Court.

**2. The Fifth Circuit Improperly Refused to Require That the Jury Be Instructed with Respect to in pari delicto and Related Equitable Defenses Contrary to This Court's Decision in Perma Life Mufflers Inc. v. International Parts Corp. and in Conflict with the Practice of Other Courts of Appeals.**

The record in the District Court established that for nearly 17 years Mr. Greene was a willing and knowing participant in General Foods' MFSA dis-

tribution system and a significant beneficiary of that arrangement. Yet the District Court refused to give an instruction requested by General Foods that Greene would not be entitled to recover damages if the jury found that he had voluntarily entered into his distributor contracts and that he freely and voluntarily participated in the conduct alleged in this case to be a violation of the antitrust laws.

The Fifth Circuit acknowledged that "Greene knowingly participated in the MFSA program," but added that whether "he was a 'willing' participant is less clear. . . ." 517 F.2d at 646. The Court nevertheless approved the refusal to grant the requested jury instruction on this point, stating that it "seriously questioned" whether *in pari delicto* and closely related equitable defenses are still viable in antitrust litigation. The Court of Appeals thereafter made its own factual findings to support the conclusion that the plaintiff should not be barred from recovering damages:

> Here the plaintiff is representative of the small businessman who acquiesces in or is coerced into a program or pattern of conduct violative of the antitrust laws. * * * [Plaintiff] had economic bargaining power greatly inferior to that of the corporation with which he dealt. * * * Accordingly, we reject the suggestion that the plaintiff should be barred from suing General Foods. . . . (517 F.2d at 646-647.)

The Fifth Circuit's resolution of this issue is incompatible with settled principles of appellate review and in direct conflict with the practice of other Courts of Appeals.

Petitioner concedes that the availability and scope of an *in pari delicto* defense to a treble damage antitrust action is legally uncertain. In *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra,* retail dealers of Midas mufflers had brought suit against Midas, Inc. and its parent organization, International Parts, alleging that the sales agreements which the dealers had with Midas prevented the plaintiffs from purchasing muffler equipment other than from Midas, imposed retail restrictions on the dealers, tied muffler sales to sales of other Midas products, and required dealers to sell at fixed retail prices. This Court noted that certain provisions of the dealership sales contracts were contrary to the self-interest of the plaintiffs and these provisions taken with other evidence indicated that plaintiffs' participation in the illegal scheme was not voluntary. This Court rejected the use of *in pari delicto* defense under the facts of that case but refused to decide whether "truly complete involvement and participation" in an illegal scheme could ever be a basis for barring a plaintiff's cause of action. 392 U.S. at 140.

Few areas of antitrust law are now more unsettled than that related to defenses raised by the conduct of the plaintiff. The nine Justices of the Court in *Perma Life* were so divided that five separate and widely divergent opinions were written for the majority. Analysis of the Supreme Court's present views regarding this defense is further complicated by the fact that since the time of this decision in 1968, three of the six Justices writing for the majority are no longer on the Court.

Other Courts of Appeals which have considered the availability of *in pari delicto* and related defenses

in private antitrust litigation subsequent to *Perma Life* have concluded that a limited defense is available and that the decision whether a plaintiff should be barred from recovery is a factual question to be resolved at trial. In *Premier Electrical Construction Co.* v. *Miller-Davis Co.*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970), the Court of Appeals held that *Perma Life* stands for a "limited rule" and that voluntary participation in an illegal scheme would bar a plaintiff from recovery:

> Many factors are, therefore, relevant in determining whether participation by the plaintiff in an illegal agreement constitutes a defense to his treble damage action. *Difficult factual questions are involved in making such a determination. This is especially true, where, as here, the plaintiff and defendant are not competitors but instead are dealing at arm's length in a vertical relationship in the purchase and sale of goods and services.* In such cases the relevant bargaining power of each party to the agreement is relevant in ascertaining whether the plaintiff was forced by economic pressures to enter into the agreement. Similarly, evidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense in particular situations.
>
> The district court erred in holding that these factual questions were sufficiently resolved by the allegations of the pleadings. (422 F.2d at 1138.) (emphasis added)

The Court of Appeals for the Fourth Circuit has interpreted the *Perma Life* decision in a similar fashion. In *Columbia Nitrogen Corp.* v. *Royster Co.*, 451 F.2d 3 (4th Cir. 1971), plaintiff had sued the defendant for breach of contract. The defendant as-

serted as a defense and counterclaim that plaintiff had violated the antitrust laws by engaging in reciprocal dealing. Defendant argued that "non-coercive" reciprocal dealing provided a basis for recovery of treble damages on the counterclaim but the District Court refused to submit this issue to the jury. On appeal the Court assumed for purposes of the opinion that non-coercive contracts for reciprocal dealing would violate the antitrust laws but concluded that defendant was not entitled to assert this violation as a basis for treble damage recovery:

> Voluntary participation in an agreement, uninfluenced by economic domination of one party over the other, is inherent in the concept of non-coercive reciprocal dealing. (451 F.2d at 15.)

Based on its analysis of the *Perma Life* decision, the Court decided that the counterclaim was exactly the kind of case the Supreme Court had excluded from the scope of its opinion:

> We think it plain, therefore, that a party, who voluntarily formulates and equally participates in a non-coercive agreement for reciprocal dealing until a declining market makes its purchases unprofitable, cannot maintain an action under § 1 of the Sherman Act against its trading partner. *See* Premier Electrical Construction v. Miller-Davis Co., 422 F.2d 1132, 1138 (7th Cir. 1970) (dictum). Accordingly, we conclude the district court committed no error by declining to instruct the jury that Columbia could recover on its counterclaim if it proved a non-coercive agreement for reciprocal dealing. (451 F.2d at 16.)

*See also Bernstein* v. *Universal Pictures, Inc.*, 517 F.2d 976, 982 (2d Cir. 1975) ("we need express no

opinion concerning the appropriate scope of this exception to the *Perma Life* rule, or regarding a comparable exception for defenses based on estoppel. Resolution of these questions should properly be deferred until the facts of this case are more fully developed at a trial or hearing.").

Indeed, while the Court of Appeals in the instant case "seriously questioned" the availability of this defense, a separate panel of the Fifth Circuit in *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975) had concluded less than two months earlier that *Perma Life* "was not intended to completely exclude the element of voluntariness as a defense to an antitrust claim. . . ." 514 F.2d at 695.

A number of District Courts have also taken the position that the *in pari delicto* defense or related equitable defenses continue to exist in the field of antitrust law and raise factual questions which must be resolved at the trial court level. Thus, in *Skouras Theatres Corp.* v. *Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357 (S.D. N.Y. 1973), defendants who had been sued for antitrust violations moved for summary judgment on the ground that the action was barred by the doctrine of *in pari delicto*. The District Court denied the motion because there were factual disputes as to whether plaintiffs voluntarily participated in the contract which they were challenging. *See also General Beverage Sales Co.-Oshkosh* v. *East Side Winery*, 396 F. Supp. 590 (E.D. Wis. 1975); *Dobbins* v. *Kawasaki Motors Corp., U.S.A.*, 326 F. Supp. 54 (D.Ore. 1973).

The Fifth Circuit's opinion evidences a clear need for Supreme Court guidance as to the use of equitable defenses in treble damage actions. The opinion is in

square conflict with the decisions of other Courts of Appeals which hold that the *in pari delicto* defense may still bar recovery in an antitrust action depending on factual findings that are made at trial. The Court below initially noted doubts as to whether equitable defenses are available under any circumstances in antitrust litigation. Then, without regard for the recognized role and competence of the jury, the Court made its own findings of fact to discredit the use of the *in pari delicto* defense here contrary to established principles of appellate review. *See Beacon Theaters, Inc.* v. *Westover*, 359 U.S. 500, 504 (1959); *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935). A writ of certiorari should issue to settle whether and to what extent the use of *in pari delicto* and related equitable defenses in private antitrust litigation remain available and to provide guidance to the federal judiciary as to the proper role of the jury in this regard.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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